

## Restitution - Duty of Insured to Read Policy to Warrant Reformation

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## RECENT DECISIONS

**Restitution — Duty of Insured to Read Policy to Warrant Reformation** — This was a declaratory judgment action to construe and determine the liabilities and rights of parties under an owner's liability insurance policy. The policy was issued by the plaintiff company to one Ogden through the plaintiff's agent. Ogden fully disclosed to the agent that he was engaged in selling and filling propane and butane containers, in addition to his retail clothing business. He told the agent that he wanted a policy that would give him full coverage for bodily injury liability and property damage liability arising out of the ownership, maintenance and use of his premises. The agent was unable to obtain a policy covering liability for the liquid gas operations but did not sell Ogden a policy based on his (Ogden's) application or declaration describing only the retail clothing business. The agent assured Ogden, however, that he did have full coverage for all business operations. The agent had attempted to supply this coverage by placing the property under a company classification used when there was no classification covering the particular business. Actually this company did have a classification for liquid gas operations. A fire resulted from a leak in one of the gas containers on the premises and apparently damaged the property of others than Ogden. The plaintiff disclaims liability on the grounds that the policy covered only hazards and liabilities arising out of the operations of the retail clothing business as described in the application and incorporated in the policy, and not those arising out of the liquid gas business. *Held*: Judgment for the plaintiff insurer. It is the insured's duty to read the policy when it is delivered to him and he is charged with knowledge of its provisions notwithstanding his failure to do so, the agent's statements notwithstanding. *United Pac. Ins. Co. v. Northwestern Nat. Ins. Co. et al.*, 185 F. (2d) 443, (10th Cir., 1950).

The insured was not entitled to reformation of the contract to include his and the agent's understanding of coverage. The "so-called" general rule applicable to the reformation of a contract because of the mutual mistake of the contracting parties has been aptly put by the New York court as early as 1881:

"... where a written instrument fails to conform to the agreement between the parties in consequence of the mutual mistake of the parties however induced, or the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties."<sup>1</sup>

The dissent in the instant case found a mutual mistake, in that the agent thought he supplied full coverage and the insured believed he was fully

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<sup>1</sup> *Albany City Savings Institution v. Burdick*, 87 N.Y. 40 (1881).

covered, and stated the contract should be reformed. The majority opinion does not deny the existence of mutual mistake but restricts its considerations to the policy itself, declaring that it is not ambiguous and the insured should have been fully aware of its provisions.<sup>2</sup> The qualifying factor in the reformation of contracts appears to be—"it was his (the insured's) duty to read the policy when it was delivered to him."<sup>3</sup> The authorities are not in accord as to whether this duty should be imposed on an insured. Appleman, in his text on Insurance,<sup>4</sup> states:

"The minority view requires that the insured act diligently in examining the policy and to notify the insurer if the contract is not satisfactory, and holds reformation to be barred by the insured's own laches if he fails so to do."

The author indicates that this is the more logical view but that it is highly questionable whether the average insured layman would comply with such a legal duty. It appears that a majority of the courts would place a duty on the insurance company or its agent to properly supply the contract bargained for under penalty of reformation for failure to do so. The most important reason for such a holding being that technical terms often result in a misunderstanding on the part of the insured as to what his coverage is.<sup>5</sup>

The Wisconsin Court in the lengthy decision of the *Bostwick* case<sup>6</sup> attempted to clarify its position toward reformation if the insured failed to read his policy. In this case the insured requested an agent of the defendant insurance company to issue a policy which would be paid up within a period of ten years. Upon receipt of the policy the insured placed it in a drawer and did not read it until five months later. The policy required payments for life. In a suit to recover the premiums paid the court refused to rescind the policy stating:

"A person is presumed to know those things which reasonable diligence on his part would bring to his attention. If he accepts the article without exercising that diligence he does so at his peril."

The opinion indicated that if the agent had done something to deter the insured from reading the policy the decision would have favored the insured. This decision caused considerable difficulty in subsequent cases, when it was felt that an award or reformation should be granted even though the insured had not read the policy. The most obvious

<sup>2</sup> ". . . we find no uncertainty or ambiguity in the terms or provisions of the policy. The legal effect thereof must therefore, be determined from a consideration of the policy itself."

<sup>3</sup> "It was his duty to read the policy when it was delivered to him and he is charged with knowledge of its provisions notwithstanding his failure to do so."

<sup>4</sup> Appleman Ins. L. & P. 858 (1941).

<sup>5</sup> 29 Am. Jur. 244 (1940).

<sup>6</sup> *Bostwick v. the Mutual Life Insurance Co. of New York*, 116 Wis. 392, 89 N.W. 538 (1903).

methods of avoiding the effect of the *Bostwick* decision appeared in the *Barley* case.<sup>7</sup> The court in this case simply stated that the *Bostwick* case was distinguishable because there had been an actual rescission in that case. The court said:

"In this state it has been held that the failure of an insured, by oversight or inadvertance, to examine his policy and discover an error therein because of mutual mistake, did not defeat his right to reformation."<sup>8</sup>

In *Wisconsin Auto Racing Asso. v. Home Ins. Co.*,<sup>9</sup> reformation of the contract was allowed subsequent to a loss. The insured wanted a policy covering expenses incurred in promoting an automobile race in the event that the race would be cancelled because of rain. The policy only provided for loss of income. The court held that since the minds of the parties met on an agreement other than that provided for in the policy, reformation should be allowed. This was done in spite of the fact that the policy clearly stated what loss would be indemnified.

Qualification of the rule requiring the insured to carefully scrutinize his policy for errors was indicated by the Wisconsin Supreme Court in 1925:<sup>10</sup>

"While as a general proposition, reasonable diligence is exacted of the suitor seeking reformation in acquiring a knowledge and understanding of the provisions of an ordinary contract, it is obvious that a complete knowledge and understanding thereof is not an inexorable requirement, else few contracts would be reformed."

It is submitted that the "categorical" rule in regard to the reformation of insurance contracts in Wisconsin be qualified by a consideration of all the facts and circumstances of each particular case in an effort to determine whether there is negligence on the part of the insured that would tend to defeat his right to have his policy of insurance reformed.<sup>11</sup> Of these facts and circumstances the use of technical terms and language is to be primarily considered. The insurance companies should not be allowed to avoid their obligations simply because the persons insured are unable to comprehend the true effect of the provisions contained in the policies. A greater degree of care should be placed on the person soliciting than the person solicited in the field of insurance.

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<sup>7</sup> *Barley v. Public Fire Ins. Co.*, 203 Wis. 338, 234 N.W. 361 (1931).

<sup>8</sup> Also see: *Komula v. General Acc. F. & L. A. Corp.*, 165 Wis. 520, 162 N.W. 919 (1917); *Journal Co. v. General Acc. F. & L. A. Corp.*, 188 Wis. 140, 205 N.W. 800 (1925); *Martin v. American Ins. Co.*, 198 Wis. 214, 223 N.W. 437 (1929).

<sup>9</sup> 216 Wis. 321, 257 N.W. 7 (1934).

<sup>10</sup> *Journal Co. v. General Acc. F. & L. A. Corp.*, 188 Wis. 140, 205 N.W. 800 (1925).

<sup>11</sup> 32 Corp. Jur. 1142.

<sup>12</sup> *Supra*, 10.